Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1994

NORTHWEST TITLE & ESCROW CORP.,
A MINNESOTA CORPORATION,
Petitioner,

vs.

EDINA REALTY, INC., EQUITY TITLE SERVICES, INC., METROPOLITAN FINANCIAL CORPORATION, BURNET REALTY, INC.,
Respondents,

COLDWELL BANKER RESIDENTIAL HOLDING COMPANY, COLDWELL BANKER RESIDENTIAL REAL ESTATE, COLDWELL BANKER RESIDENTIAL AFFILIATES, INC., GUARDIAN TITLE SERVICES CO.,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the practice by real estate brokers of directing referrals of customers of independent real estate agents and mortgage lenders to the broker's own title insurance company in exchange for access by mortgage lenders to the broker's and agent's customers constitute reciprocal dealing under Section 1 of the Sherman Act?

2. Does conduct that violates the Sherman Act and RESPA, which prevents kickbacks and other incentive payments for referrals of business in the real estate industry, constitute a per se violation of the Sherman Act?

3. Does the use of reciprocal dealing to leverage power in the primary market of real estate sales to a monopoly in the ancillary services aftermarkets violate Section 2 of the Sherman Act pursuant to Eastman Kodak Co. v. Image Technical Devices, Inc., 112 S. Ct. 2072 (1992)?

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EDINA REALTY, INC., EQUITY TITLE SERVICES, INC.,
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BURNET REALTY, INC., *Respondents*

COLDWELL BANKER RESIDENTIAL HOLDING
COMPANY, COLDWELL BANKER RESIDENTIAL REAL
ESTATE, COLDWELL BANKER RESIDENTIAL
AFFILIATES, INC., GUARDIAN TITLE
SERVICES CO., *Defendants*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner Northwest Title & Escrow Corp. respectfully prays that a writ of certiorari issue to review the Order of the Eighth Circuit Court of Appeals entered in the above-entitled proceeding on February 13, 1995.

OPINIONS BELOW

The Memorandum and Order of the United States District Court, District of Minnesota, dismissing the complaint is unpublished and is reprinted in the appendix hereto, p. A-1 - A-7.

The opinion of the Eighth Circuit Court of Appeals is unpublished and is reprinted in the appendix hereto, p. A-8 - A-11.

The denial of the Petition for Rehearing is reprinted in the appendix hereto, p. A-12.

JURISDICTION

The jurisdiction of the Court to review the Order of the Eight Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

Petitioner brought this action in Minnesota state court in 1992. Defendants Coldwell Banker and Guardian Title (no longer parties to this action) removed the case to the United States District Court on the basis of diversity, pursuant to 28 U.S.C. § 1332. Respondents brought a Motion to Dismiss which was granted by Order filed December 13, 1993. Petitioner appealed to the United States Court of Appeals, Eighth Circuit, which affirmed the District Court by Order filed January 6, 1995, and Petitioner's Petition for Rehearing and Suggestion for Hearing En Banc was refused, by Order filed February 13, 1995. The Petition has been submitted within ninety (90) days of the denial of the Petition for Rehearing and is, accordingly, timely under Rule 13.4 of the Rules of the Supreme Court.

STATUTES INVOLVED

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

12 U.S.C. § 2607

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) controlled business arrangements so long as (A) at or prior to the time of the referral a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with the referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred, except that where a lender makes the referral, this requirement may be satisfied as part of and at the time that the estimates of settlement charges required under section 2605(c) of this title are provided, (B) such person is not required to use any particular provider of settlement services, and (C(the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the

issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any state may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on controlled business arrangements shall be construed as being inconsistent with this section.

28 U.S.C. § 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought

under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This case squarely addresses the issue of whether reverse competition can be manipulated by vertically integrated firms to capture referrals from the primary market of real estate sales and use them to control the secondary market of title insurance sales and whether that practice is harmful to competition in the secondary title insurance market. Petitioner, a competitor of Respondents in the secondary market of title insurance, has claimed that the practice of real estate brokerages in directing referrals for secondary market ancillary services to their own subsidiaries, eliminates competition for title insurance based on price and quality and instead directs competition away from the consumer and towards the source of referrals, real estate agents and mortgage lenders. Petitioner's Complaint alleges that the scheme involves a conspiracy among the real estate brokerages, independent real estate agents and participating mortgage lenders which states a claim for reciprocal dealing under 15 U.S.C. § 1 and monopoly leveraging under 15 U.S.C. § 2 (hereinafter the Sherman Act). Petitioner also claims in its Complaint that the scheme violates the Real Estate Settlement and Procedures Act, 12 U.S.C. § 2607 (hereinafter RESPA), a federal statute specifically enacted to eliminate kickbacks resulting from reverse competition in the real estate industry. Petitioner has requested in its Complaint declaratory relief, of which the lower courts have ruled that Petitioner lacks standing, even though Petitioner is subject to the provisions of RESPA. Petitioner also maintains that the alleged violation of RESPA sets forth a separate claim for antitrust relief because the Sherman Act and RESPA are statutes that are in *pari materia*. Petitioner's claim is based upon the legislative history of RESPA and also upon decisions from other federal circuit courts. Accordingly, the holding of the Eighth Circuit is in conflict with the other circuits.

The Complaint sets forth a number of separate theories of relief arising under federal statutes and Minnesota law relating to the attempt by the Respondent real estate brokers to exclude Petitioner, an independent title insurance company, from competing

with the brokers' own title companies. Even though the Complaint was initially filed in state court, the federal district court dismissed the state claims without prejudice, rather than remanding them to state court.

The Court also dismissed Count 1, the Section 1 Sherman Act claim, without prejudice. Counts 2-5 were dismissed with prejudice. Petitioner's appeal was limited to the dismissals of Count 1, which related to reciprocal dealing, Counts 2 and 3, which related to RESPA, and Count 5, which raised claims under Section 2 of the Sherman Act. The relief requested by Petitioner included damages and injunctive relief under the Sherman Act and its state law equivalent, Minn. Stat. § 325.57, and declaratory relief, addressed to the RESPA violations by Respondents, under 28 U.S.C. § 2201. The District Court Order of Dismissal was affirmed by the Eighth Circuit Court of Appeals on January 6, 1995. Petitioner's Suggestion and Petition for Rehearing was refused February 13, 1995.

Petitioner's Complaint and its arguments before the District Court and Court of Appeals demonstrate that this case presents substantial issues of law with a profound impact on the nature and structure of the real estate, title insurance and financial industries throughout the nation. Petitioner has raised issues, using the appropriate means of requesting declaratory relief, to resolve the question of the legality of certain aspects of the business of Petitioner and Respondents. The legality of Respondent's marketing scheme affects not only the nature and structure of the industry, but also rewards firms willing to take the risk that the law will not be enforced. In this case, declaratory relief is not only particularly appropriate, but is especially necessary and helpful because of the confusing interrelationship of RESPA to the Sherman Act and an apparent concession to vertically integrated entities created by the 1983 Amendments to RESPA. The lower courts have been unwilling to clarify these issues which are critical to the determination of the legality of Petitioner's conduct, as well as that of Respondents. Therefore, Petitioner has requested a judicial resolution of an actual controversy by the submission of this Petition and requests clarification of the confusing precedent,

which is in conflict with other circuits, created by the lower courts' decisions in this case.

REASONS FOR GRANTING THE PETITION

I.

The Complaint sets forth sufficient facts and claims that the Respondent real estate brokers' practices of directing referrals of customers of independent real estate agents and mortgage lenders to the brokers' own title companies to support a legal theory of reciprocal dealing in violation of Section 1 of the Sherman Act.

In its Complaint, Petitioner alleged that Petitioner operates an independent title insurance agency in the Twin Cities metropolitan area. Respondent Edina Realty conducts a real estate brokerage and Equity Title, Inc. is a subsidiary of Edina Realty. Respondent Burnet Realty, Inc. is also a real estate brokerage and does business as First Security Title, a settlement service provider, in competition with the Petitioner. The Complaint identifies the nature and purpose of title insurance and that settlement services in the Twin Cities metropolitan area are provided by title insurance companies or independent closing agents. A part of the service provided by Petitioner and its competitors is the preparation of documents required of buyers and sellers in real estate transactions. The Complaint further identifies that mortgage lenders in Minnesota require their borrowers to purchase title insurance as a condition for obtaining mortgages for residential property and that mortgage lenders refer business to title insurance companies rather than having title insurance companies obtain business directly from consumers. Mortgage lenders obtain their business through referrals from real estate agents. Petitioner alleged in its Complaint that the named defendants and other unnamed co-conspirators have conspired to violate RESPA and to unlawfully boycott Petitioner

and other independent title companies in favor of their own title companies. The Complaint sets forth a number of ways in which this conspiracy was completed. First, as a matter of corporate policy, the Respondent brokers attempted to have as much business referred from independent agents licensed by Respondents to Respondents' own title insurance company, and that adherence to this marketing plan was accomplished by misrepresentation and direct coercion upon the agents by the brokers. The Complaint further alleges that salesmen and managers of the Respondents received bonuses, generous commission splits and other compensation and considerations for the referral of business, which were in fact paid by the brokers' title companies. The Complaint further alleges that Respondents provided financial rewards to agents who directed and referred title insurance business to Respondents. A further inducement to agents to direct business to Respondents was to permit agents to obtain their commission checks at the time of closing but requiring competing title companies to forward the commission check to the broker who would pay the agents at a later date. The Complaint further specifies that the conspiracy and boycott involved an agreement among the mortgage lenders, real estate agents and the brokers to refer each other the business generated by their activities to each other and to boycott all competitors engaged in competition with the Respondents who were not part of the conspiracy. These facts set forth and form the foundation for a well-pleaded and supported legal theory of coercive reciprocity, also known as reciprocal dealing. The Complaint further alleged, in addition to stating a claim for antitrust relief under a reciprocal dealing theory, that these various schemes, contracts, coercive tactics, kickbacks, and arrangements of the brokers to induce and coerce the participating real estate agents and lenders to participate in the marketing program was also in violation of RESPA and was, therefore, also a *per se* violation of the Sherman Act and the Minnesota Antitrust Act as a separate antitrust theory. The attempt to leverage market share into the secondary market also states a claim under Section 2 of the Sherman Act. In Count 5 of the Complaint Petitioner alleged that the aforesaid illegal activities constituted an attempt

and a conspiracy to monopolize the sale of residential title insurance in the Twin Cities metropolitan area and that if the miscellaneous schemes, conspiracies and boycotts were permitted to continue, there exists a dangerous probability that monopolization of residential title insurance in the Twin Cities metropolitan area could be accomplished.

The District Court dismissed Count 1 of the Complaint for failure "to allege a horizontal conspiracy between defendants," Memorandum Opinion, p. 4, and because "invoking antitrust 'buzzwords' such as 'boycott' and 'coercive reciprocity' will not suffice." Furthermore, "[b]ecause the Plaintiff makes no specific allegations but instead only makes vague accusations of a 'boycott' and 'coercive reciprocity' against Defendants, Plaintiff has failed to state a proper legal claim in Count I." Memorandum Opinion, p. 4. The District Court misidentified the legal theory advanced by the Petitioner. The Court of Appeals correctly identified the Petitioner's legal theories and refuted the District Court's contention that the Complaint set forth mere "buzzwords" when it employed in its Opinion the cognizable statement of facts and theories of the case clearly adopted from the abundant factual allegations in the Complaint. The Court of Appeals did not endorse the erroneous characterization of the Petitioner's legal theories which were adopted by the District Court. Notwithstanding the recognition of the abundance of facts that supported Petitioner's legal theories and the different recognition of the relevant legal issues by the Court of Appeals, which were entirely contrary to the interpretation of facts and legal issues discussed by the District Court, the Court of Appeals affirmed the District Court's decision without comment or authority. The result is a confusing precedent from which the Petitioner and interested observers must imply holdings and reasoning that are inconsistent with existing law and contrary to authority from other jurisdictions.

The facts alleged in the Complaint clearly identify specific instances of conduct by Respondents and a general pattern and design of engaging in conduct designed to coerce and induce mortgage lenders and real estate agents to use Respondents' own title company and to, consequently, boycott Petitioner. The danger

inherent in reciprocal dealing has been accomplished in this case by the Respondent real estate brokers. The choice of a title company selection by mortgage lenders and real estate agents is influenced by coercion and direct compensation to the referral source rather than price and quality. Competition is foreclosed to competitors who refuse to pay kickbacks unless competing title insurance companies affiliate with another controlled business entity. Without competition, the effects of reverse competition, which is harmful to competition and consumers, sets in. That scenario describes the current real estate and title insurance markets in the Twin Cities area.

The District Court's emphasis on the need for direct evidence of a conspiracy between the named defendants ignores the historical importance of the likelihood of finding collusion in an oligopolistic market, and the need to infer collusion by circumstantial evidence rather than direct evidence. But even that analysis missed the point and was inconsistent with the facts and logic of the Complaint from which the Court could infer the appropriate legal theory. The District Court's opinion completely ignored Petitioner's continuous assertions that it did not plead a horizontal conspiracy, but parallel patterns of reciprocal dealing, which consisted of vertical activity in an oligopolistic market dominated by two entities. The briefs and arguments of Petitioner make clear that its Complaint and arguments were addressed to the issue of reciprocal dealing.

Reciprocal dealing, as an antitrust theory, is well-accepted and formed the basis for a finding of violations of Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 5 of the FTC Act (15 U.S.C. § 45) as well as Section 1 of the Sherman Act. FTC v. Consolidated Foods, 380 U.S. 592 (1965); United States v. General Dynamics, 258 F. Supp. 36 (S.D.N.Y. 1966). Reciprocal dealing was applied under Section 1 of the Sherman Act in the Second Circuit, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. (1979), cert. denied 444 U.S. 1093 (1980); Ninth Circuit, Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203 (9th Cir. 1982); De Voto v. Pacific Fidelity Life Ins. Co., 516 F.2d 1 (9th Cir. 1975), cert. denied, 423 U.S. 894 (1975); and Eleventh Circuit, Key

Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990), vacated 979 F.2d 806 (11th Cir. 1992). Coercive reciprocity was reviewed favorably by the Eighth Circuit, Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982); and the District of Minnesota, Ryals v. National Car Rental System, Inc., 404 F. Supp. 481 (D. Minn. 1975). The practice of reciprocal dealing has been consistently condemned in Section 2 cases. United States v. Griffith, 334 U.S. 100 (1948); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

The facts in De Voto are almost identical with this case except that De Voto involved mortgage insurance rather than title insurance. The problem addressed and found unlawful in De Voto was the same problem that is destroying competition in the title insurance industry. The failure of the Minnesota District Court to correctly apprehend the legal issue of Count 1 of the Complaint and the reluctance of the Court of Appeals to address the reciprocal dealing issue should not prevent the Supreme Court from squarely addressing the main issue in the case at hand. The use of coercion by real estate brokers to facilitate reciprocal dealing relationships is a practice that has become a nationwide trend following the Minnesota practice. This trend jeopardizes the existence of independent title agencies and independent real estate brokers in general and needs to be addressed by the courts. This trend was outlined in a 1977 U.S. Department of Justice study that accurately predicted the impact of the controlled business amendments to RESPA, enacted in 1983. 1977 U.S. Department of Justice, The Pricing and Marketing of Insurance, a Report of the U.S. Department of Justice to the Task Force on Antitrust Incentives at p. 270. The existence of controlled business as an active marketing strategy to leverage business from one economic level to another either violates the antitrust laws or discriminates against independent competitors in favor of vertically integrated competitors. This practical, unintended consequence of the 1983 amendments has resulted from lack of enforcement of RESPA and the inability of competitors like Petitioner to have their antitrust claims heard. A fair and just resolution of this case, therefore, is

essential to the individual parties and also to the industry in general.

II.

> There now exists a split in the circuits as to whether a violation of a federal statute that makes illegal specific instances of anticompetitive conduct is also evidence of a violation of the Sherman Act.

In Counts 2 and 3 of the Complaint, Petitioner alleged that Respondents adopted a conscious marketing strategy to engage in activities in the form of kickbacks, subsidies, incentives and inducements to sources of referral business to obtain settlement service and title insurance business. The Complaint alleged that those activities violated RESPA, which is a federal statute specifically enacted to prevent those anticompetitive activities. The Complaint sought declaratory relief, which is authorized under 28 U.S.C. § 2201, to determine whether such activities violated RESPA. The Complaint also alleged, in paragraph 42, that if such conduct violated RESPA and the Sherman Act, the activity would be a *per se* violation of the Sherman Act. Petitioner explained and argued in its brief and oral arguments that the activity which violated RESPA was both evidence of anticompetitive conduct under the Sherman Act and a bar to the assertion of a Rule of Reason theory by Respondents.

The District Court ruled that Petitioner lacked standing under RESPA and dismissed Counts 2 and 3 with prejudice. The Court of Appeals affirmed without comment. Because the federal courts clearly have authority to grant declaratory relief in this case, 28 U.S.C. § 2201, which would extend to construing rights and obligations under RESPA, a federal statute, but that the authority to grant declaratory relief is also clearly discretionary, the dismissal in this case must be interpreted as a refusal to exercise discretionary jurisdiction. However, because the District Court decision is in direct conflict with Jefferson-Pilot Title Insurance Co. v. Investors Title Co., Civil Action No. C-88-137-C, Middle Dist.

of No. Carolina 1990, and because the decision departs from accepted antitrust analysis present in Farley Transp. Co. v. Santa Fe Transp. Co., 786 F.2d 1342 (9th Cir. 1984), [Sherman Act construed in *pari materia* with the Interstate Commerce Commission Act]; and Silver v. N.Y. Stock Exchange, 373 U.S. 341 (1963), [the Sherman Act construed in *pari materia* with the Securities and Exchange Act] and because of the significant impact of the issues present in this case on the real estate and title insurance industries and because of the uncertainty of the application of RESPA, the Supreme Court should exercise its discretionary jurisdiction to decide the RESPA issues or direct that the declaratory relief requested in the Complaint be determined.

To hold that a competitor cannot have determined whether conduct engaged in by another competitor is a violation of a federal statute or to have determined the boundaries of Petitioner's own conduct and whether such conduct violates the law is contrary to 28 U.S.C. § 2201, court precedent and principles of fundamental law. It has been a cornerstone of the application of proper and constitutional judicial authority that the judiciary could and should determine the rights and responsibilities of parties where application of law is uncertain. Quoting Bracton, "It would be superfluous to make laws, unless those laws, when made, were to be enforced," Justice James Wilson distinguished between the executive and judicial authority in our early constitutional history. Justice Wilson stated that "when the laws are plain and the application of them is uncontroverted, they are enforced immediately by the executive authority of government." However, ". . . when the application of them is doubtful or intricate, the interposition of the judicial authority becomes necessary." Chisholm v. Georgia, 2 Dall. 419, 465 (1792). The application of RESPA to Petitioner and Respondents is not clear. Because the lower courts did not decide the declaratory judgment issues, the application of RESPA to the conduct of Petitioner and Respondents remains unclear. The lower courts have not only refused to enforce laws that bind all parties to this lawsuit, which has the effect of foreclosing competition to all competitors who abide by the law, it has further ruled, in effect and by implication, that

RESPA has created an exemption from the antitrust laws. Petitioner disputes that implication by arguing that RESPA and the Sherman Act should be construed in *pari materia*, in accordance with the general weight of authority from other circuits. Farley Transp. Co. v. Santa Fe Transp. Co., 786 F.2d 1342 (9th Cir. 1984) (quoting Western Concrete Structures Co. v. Mitsui Co. (U.S.A.), Inc., 760 F.2d 1013 (9th Cir. 1985) ". . . . it is the law, rather than cost, that prevents the defendant's competitors from matching the defendant's price"). The lower court rulings in this case create a confusing precedent in direct conflict with Jefferson-Pilot, which specifically related RESPA to the Sherman Act, and Farley Transport, which related other federal regulatory statutes to the Sherman Act, and which conflicts in principle with Silver v. N.Y. Stock Exchange, which required an express finding that a statute created an exemption from the Sherman Act.

III.

The lower courts failed to apply the ruling recently set forth in Kodak to the financial services and real estate industries.

Petitioner alleged that the Respondents' marketing plans to leverage their market share in the primary real estate market into the ancillary title insurance market was an attempt and a conspiracy to monopolize the title insurance market in the Twin Cities metropolitan area in violation of Section 2 of the Sherman Act. The Respondents' conduct would have the effect of creating a monopoly in the submarket of agents licensed to the individual broker. This theory is based upon and analogous to Eastman Kodak Co. v. Image Technical Devices, Inc., 504 U.S. 451 (1992). The Respondents' marketing plans would inevitably lead to a monopoly in the primary real estate market. Petitioner's theory was set forth in footnote 3 of its brief to the Eighth Circuit Court of Appeals. Petitioner argued that, as in Kodak, the Respondents possess monopoly power in the title insurance aftermarket, derived

by sales generated by Respondents' sales agents. The district court holding and the Respondents' contention that because Respondents compete in the primary real estate market, monopoly power in the title insurance aftermarket is an impossibility, is clearly erroneous and contrary to Kodak. In addition, because of the substantial market share of the Respondents in the primary market and because of the existence of reverse competition, Respondents are also able to direct a substantial portion of business into the title insurance aftermarket at increased prices. The profits realized from the increase in price can then be passed on to the real estate agents, the source of the referral, who receive a higher percentage of the sales commission. Independent real estate brokers cannot compete for real estate agents because they have no separate income source to compete for real estate agents who demand the higher commission split. Although the Respondent broker makes little or no profit in the primary market, the profits in the aftermarket subsidize activities in the primary market. Such a practice would identify the broker's activities in the primary real estate market as predatory, allowing them to eliminate competition from independent real estate brokers. Accordingly, the Respondents' act of leveraging market share into the ancillary market, made possible by reverse competition, supports an additional threat of attempted monopoly in the primary market. Monopolization in the primary market necessarily results in monopolization in the secondary market, when competition has already been eliminated by the use of vertically integrated controlled business entities. A monopoly in the primary real estate market, if the marketing scheme was successful, would also create a monopoly in the title insurance market as a whole.

The Court of Appeals cited the Kodak opinion with approval, but upheld the dismissal of Count 5 of the Complaint for failing to specifically identify the submarket as the relevant market in the Complaint. Despite its not having pleaded all possible relevant markets, the allegations of the Complaint are sufficient to survive a motion to dismiss. Success in the ancillary aftermarket directly leads to the ability to attempt a monopoly in the primary market because of the effect of reverse competition. The existence

of reverse competition is a factor in this case which compounds the danger addressed in Kodak. As argued by Petitioners, success in the aftermarket permits the Respondents to increase market share in the primary market, by excluding competitors who do not engage in some form of reverse competition. Accordingly, Petitioner's attempted monopoly theory makes economic sense under Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986) and should not have been dismissed.

CONCLUSION

Petitioner respectfully requests that the United States Supreme Court grant the Petition and issue a Writ of Certiorari to review and reverse the affirmance of the District Court decision by the Eighth Circuit Court of Appeals, on the grounds that Respondents' conduct establishes a claim of reciprocal dealing in violation of Section 1 of the Sherman and an attempt to monopolize in violation of Section 2 of the Sherman Act. Petitioner further requests this Court resolve the conflict between circuits as to the proper relationship of federal statutes relating to anticompetitive conduct and the Sherman Act and to the specific relationship of RESPA to the Sherman Act and whether violations of both statutes renders such illegal conduct as a per se violation of the Sherman Act.

Respectfully Submitted,

Dated: May 11, 1995

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Northwest Title and Escrow Corp., Civ. File No. 3-93-436

Plaintiff,

v. **MEMORANDUM AND ORDER**

Edina Realty, Inc., Equity Title Services, Inc., Metropolitan Financial Corp., Burnet Realty, Inc., Coldwell Banker Residential Holding Co., Coldwell Banker Residential Real Estate, Coldwell Banker Residential Affiliates, Inc., and Guardian Title Services Co.,

Defendants.

I. INTRODUCTION

This matter is before the Court upon Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). For the following reasons, the Court grants Defendants' motion.

II. BACKGROUND

Plaintiff sells residential title insurance and provides settlement services throughout Minnesota. Title insurance, which protects an owner or lender against defects in the title to real property, may be sold in Minnesota only by licensed title insurance companies or by authorized and licensed agents of those companies. Most mortgage lenders require borrowers to purchase

title insurance as a condition for obtaining loans for the purchase of real property. Settlement services include the preparation of documents involved in the transfer of real property.

Defendants Equity Title Services, Inc. and Burnet Realty, Inc., doing business as First Security Title and Guardian Title, also provide settlement services and sell title insurance in Minnesota and are competitors of Plaintiff. These Defendants are each affiliated with a company that performs sales brokerage services for prospective buyers and sellers of homes. Equity Title is a subsidiary of Defendant Metropolitan Financial Corporation, which also owns Defendant Edina Realty, a real estate brokerage firm that has contractual relationships with numerous real estate agents. Burnet Realty is also a real estate brokerage firm with contractual relationships with hundreds of real estate agents. Defendants Coldwell Banker Residential Holding Company and Coldwell Banker Residential Affiliates, Inc. (collectively referred to as "Coldwell Banker") are affiliated with Guardian Title and maintain franchises in the Twin Cities area.

Plaintiff alleges that Defendants have engaged in anticompetitive behavior in violation of federal and state antitrust laws (Counts One through Five). Plaintiff also brings claims of Minnesota Deceptive Trade Practices Act violations (Count Six), tortious interference with business relations (Count Seven), and intentional interference with prospective contractual relations (Count Eight). Defendants move to dismiss Plaintiff's Complaint on the grounds that it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

III. DISCUSSION

For the purposes of the Defendant's Motion to Dismiss, the Court takes all facts alleged in Plaintiffs Complaint as true. Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiff. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). A

motion to dismiss will be granted only if "it appears beyond doubt that the Plaintiff can prove no set of facts which would entitle him to relief." Id.; see Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court applies those standards in the following discussion.

A. Count One

In Counts One through Four, Plaintiff alleges violations of Section One of the Sherman Act, 15 U.S.C. § 1, which prohibits conspiracies in restraint of trade.[1] To withstand a motion to dismiss on a Section One claim, Plaintiff must plead an agreement or conspiracy. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). It must show that the Defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984). Plaintiff must go further than merely alleging a conspiracy existed, for "'a bare bones [accusation] of conspiracy. . . without any supporting facts' is insufficient to state an antitrust claim." TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026 (10th Cir. 1992)(quoting Mountain View Pharmacy v. Abbott Labs., 630 F.2d 1383, 1388 (10th Cir. 1990)) (alterations in original); see also Five Smiths, Inc. v. National Football League Players Ass'n, 788 F. Supp. 1042, 1048 (D. Minn. 1992) ("general allegations of conspiracy, without a statement of 'the facts constituting the conspiracy, its objects, and accomplishment,' are inadequate to state a cause of action"). Merely invoking antitrust "buzz words" such

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[1]These counts also include claims under the Minnesota antitrust laws and the Minnesota Deceptive Trade Practices Act (MDTPA). The relevant portions of the Minnesota antitrust statute correspond directly with the federal antitrust provisions and thus do not merit separate discussion. See Sports and Travel Marketing, Inc. v. Chicago Cutlery Co., 811 F. Supp. 1372, 1384 n.18 (D. Minn. 1993). The MDTPA claims are also raised in Count Six and will be considered in conjunction with that count.

as "boycott" and "coercive reciprocity" will not suffice. See T.V. Communications, 964 F.2d at 1026.

This "buzz word" tactic is exactly the approach Northwest Title has used in this case, and it is a tactic that cannot succeed. With respect to Count One, Plaintiff has failed to allege a horizontal conspiracy between Defendants, which it refers to only collectively and not by identifying any particular roles as conspirators. See Carlock v. Pillsbury Co., [1993-1] Trade Cas. (CCH) ¶70,282, ¶70,434 (D. Minn. Oct. 13, 1988). Because the Plaintiff makes no specific allegations but instead only makes vague accusations of a "boycott" and "coercive reciprocity" against Defendants, Plaintiff has failed to state a proper legal claim in Count One. Therefore, Count One is dismissed without prejudice.

B. Counts Two and Three

In Counts Two and Three, Plaintiff claims that Defendants violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq., and thereby committed "per se" violations of the antitrust laws. These counts also fail to state a claim upon which relief can be granted. First, Congress did not confer standing under RESPA upon competing title insurers and settlement service providers. Only the individual charged for the settlement service or the buyer has standing under the statute. 12 U.S.C. § 2607(d)(2), 2608(b). "RESPA's specifically conferred private causes of action for one class of plaintiffs directly negates any possible implication of a like cause of action for plaintiffs such as [competitors], who are not a part of that class." Mid-America Title v. Chicago Title Ins. Co., 1989 WL 39780, at '4 (N.D. Ill. Apr. 18, 1989).

Second, contrary to Plaintiffs arguments, a violation of RESPA does not constitute a violation of Section One of the Sherman Act. Antitrust laws, as distinguished from other consumer protection laws such as RESPA, focus directly on the anticompetitive effects of actions taken by market participants. See Nat'l Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690-92 (1978) (antitrust analysis "confined to a consideration of impact on competitive conditions"). "Conduct not within the scope

of the [Sherman] Act is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some other law." Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 447 (3d Cir. 1978). For these reasons, courts have dismissed antitrust claims which are based on alleged violations of other laws. See, e.g., Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988) (Section One claim dismissed where only basis for claim was that defendant " allegedly engaged in a conspiracy to violate the Medicare laws"); Action Ambulance Serv., Inc. v. Atlanticare Health Servs., Inc., 815 F. Supp. 33, 37-38 (D. Mass. 1993) (alleged violations of Medicare and Medicaid laws could not constitute antitrust violations). Plaintiffs claims that Defendants violated RESPA do not state a claim under Section One of the Sherman Act. Therefore, Counts Two and Three are dismissed with prejudice.

C. Count Four

Count Four of the Complaint is alleged only against Defendants Edina Realty and Coldwell Banker. Plaintiff contends that these Defendants engaged in separate vertical pricefixing schemes. A number of flaws are present in Plaintiffs claim. First, Section One "does not reach conduct that is 'wholly unilateral.'" Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (citation omitted).

Second, as a competitor of Defendants, Northwest Title lacks standing to bring a pricefixing claim "unless it results in predatory pricing." Atlantic Richfield Co. v. U.S.A. Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1891-92 (1990). In Atlantic Richfield, the Supreme Court specifically distinguished its prior decision in Albrecht v. Herald Co., 390 U.S. 145 (1968), upon which Plaintiff attempts to rely. The Supreme Court pointed out that the agreement in Albrecht constituted a per se violation of the antitrust laws "because of its potential effects on dealers and consumers, not because of its effect on competitors." 110 S. Ct. at 1890. The Court then reiterated its decision in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n. 8 (1986),

which stated that a competitor "may not complaint of conspiracies that . . . set minimum prices at any level." Id.

D. Count Five

In Count Five of the Complaint, Plaintiff alleges that Defendants have conspired to monopolize the title insurance and settlement services market in violation of Section Two of the Sherman Act. When alleging Section Two violations, plaintiffs must plead and prove that a single force in the market has sufficient market share to exercise monopoly power or that there is "a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 891 (1993); United States v. Empire Gas Corp., 537 F.2d 296, 305 (8th Cir. 1976). In its memorandum in opposition, Plaintiff admits that it has not alleged a horizontal conspiracy among the three defendants. Given this admission, Plaintiff appears to argue that three separate entities have separately and successfully attempted to monopolize the same market. This argument is illogical, for if three different parties acting individually are succeeding in the market, there is certainly no "dangerous probability" of one of them achieving monopoly power, and they are not united to form a single monopolistic force.

Plaintiffs heavy reliance on Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990), vacated, 979 F.2d 806 (11th Cir. 1992), is misguided. That case has been vacated by the Eleventh Circuit and is no longer good law. Because Plaintiff has failed to state a claim upon which relief can be granted, Count Five is dismissed with prejudice.

E. Counts Six Through Eight

Because no claims remain over which this Court has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(c)(3). Plaintiffs

state law claims (Counts Six through Eight) are therefore dismissed without prejudice.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion to Dismiss is GRANTED; and

2. Counts One, Six, Seven, and Eight are DISMISSED WITHOUT PREJUDICE; and

3. Counts Two, Three, Four, and Five are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 11,1993

/s/
Paul A Magnuson
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1118

Northwest Title and Escrow Corp., a Minnesota corporation,	*	
Appellant,	*	
v.	*	
Edina Realty, Inc., Equity Title Services, Inc., Metropolitan Financial Corporation; Burnet Realty, Inc.	*	
Appellees.	*	Appeal from the United States District Court for the District of Minnesota [UNPUBLISHED]
Coldwell Banker Residential Holding Company; Coldwell Banker Residential Real Estate; Coldwell Banker Residential Affiliates, Inc.; Guardian Title Services Co.,	*	
Defendants.	*	

Submitted: October 13, 1994

Filed: January 6, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

Northwest Title & Escrow Corp. ("Northwest Title") brought this action against three separate defendant groups asserting claims under Sections 1 and 2 of the Sherman Act, state antitrust laws, and state common law. Each of the three defendant groups moved to dismiss all counts of Northwest Title's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motion and dismissed Count 1 without prejudice, Counts 2-5 with prejudice, and Counts 6-8 because the court declined to exercise supplemental jurisdiction. Northwest Title & Escrow Corp. V. Edina Realty, No. 3-93-436 (D. Minn. filed December 13, 1993) (Memorandum and Order). This appeal followed. For the reasons discussed below, we affirm the Judgment of the district court.

Northwest Title sells residential title insurance and provides settlement services throughout Minnesota. Defendants Equity Title Services ("Equity Title") and Burnet Realty ("Burnet") also provide settlement services and sell title insurance in Minnesota. Equity Title is a subsidiary of defendant Metropolitan Financial Corp., which also owns defendant Edina Realty, a real estate brokerage firm that has contractual relationships with numerous real estate agents. Burnet is also a real estate brokerage firm with contractual relationships with numerous agents. The third defendant group, Coldwell Banker and its affiliates, was not a party to this appeal.

Northwest Title alleged that defendants' use of coercion to channel title insurance business to the respective broker's title insurance company was a per se violation of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2607-2608, and Section 1 of the Sherman Act. 15 U.S.C. § 1-2. Northwest Title claimed that through a deliberate marketing strategy, defendants had a scheme to leverage market share in the primary market of real estate listings and sales into market share in the title insurance market. Northwest Title further alleged that since 1986, defendants have

engaged in conspiracies, such as unlawful boycotts of competing title insurance companies, to violate RESPA and that it was a corporate policy of defendants to require their real estate agents to refer the ancillary title insurance and settlement services from real estate sales to affiliated entities.

Furthermore, Northwest Title claimed that affirmative misrepresentation and direct coercion were employed by defendants to insure adherence to the mandatory plans. Northwest Title claimed that defendants' sales agents and managers received bonuses, generous commission splits and other compensation for referring business to their respective settlement service providers, which were paid by earnings from those same providers. In addition, Northwest Title asserted that defendants provided financial rewards and applied coercion to independent real estate agents to direct settlement and title insurance business to their respective settlement service providers. Northwest Title also alleged that the defendants violated Section 2 of the Sherman Act by attempting and conspiring to monopolize the sale of residential real estate title insurance in the Twin Cities metropolitan area.

In Counts 2 and 3, Northwest Title alleged that violations of RESPA were a per se violation of § 1 of the Sherman Act. It argues on appeal that RESPA was specifically designed to eliminate anticompetitive activities in the real estate industry and that one of the reasons RESPA was passed was to prevent the use of kickbacks from title insurers to agents in exchange for referrals of settlement business. In Northwest Title's view, a violation of RESPA is an unreasonable restraint of trade because of the nature of the wrongful conduct. Northwest Title does not argue the dismissal of Count 4, a price-fixing claim, on this appeal.

Defendants respond that Northwest Title invoked RESPA in an attempt to use the antitrust laws to circumvent those RESPA provisions which plainly prohibited competitors from suing for a RESPA violation. Defendants argue the district court was correct in dismissing Counts Two and Three with prejudice because

Northwest Title lacked standing to sue under RESPA and because a violation of RESPA does not constitute a per se violation of § 1 of the Sherman Act. We agree with the district court that the statute limited the class of persons with a cause of action under RESPA to purchasers of title insurance and that it is the consumers, not the competitors, who are protected under RESPA.

Northwest Title also argues it should have been given the opportunity to amend the complaint in order to define with more clarity the relevant market in its monopolization claim (Count 5). It maintains that there can be monopolization in an aftermarket even if there is competition in the primary market. See Eastman Kodak Co. v. Image Technical Services, 112 S. Ct. 2072 (1992). Northwest Title argues that while there may be competition in the primary real estate market, defendants violated § 2 of the Sherman Act in the aftermarkets of title insurance and settling services.

Defendants argue that a basic requirement for § 2 claims is a single force which has monopoly power or has a dangerous probability of success in an attempt to monopolize in a relevant market. Defendants emphasize that in Count 5, Northwest Title not refer to any of the specific defendants or defendant groups. It only used the term "defendants. The district court noted that Northwest Title admitted that it was not alleging a horizontal conspiracy among the three defendant groups. The district court therefore reasoned that if there were three separate competitors and each had significant market power, there would be no dangerous probability of any one of them attaining monopoly power. We agree.

Having carefully reviewed the record and the arguments set forth by all parties, we hold that the district court committed no error in its disposition of this matter. We therefore affirm the Judgment of the district court. See 8th Cir. R. 47B.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1118MNST

Northwest Title and Escrow Corp.,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
	*	Rehearing and Suggestion
vs.	*	for Rehearing En Banc
	*	
Edina Realty, Inc., et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition rehearing by the panel is also denied.

February 13, 1995

Order Entered at the Direction of the Court:

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit